

UNITED STATES DEPARTMENT OF AGRICULTURE BEFORE THE SECRETARY OF AGRICULTURE

In re:) P. & S. Docket No. D-96-26
)
Arizona Livestock Auction, Inc.,)
) Order Denying Petition
Respondent) for Reconsideration

The Acting Deputy Administrator, Packers and Stockyards Programs (hereinafter Complainant), instituted this proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (hereinafter the Packers and Stockyards Act), (7 U.S.C. §§ 181-229); the regulations promulgated under the Packers and Stockyards Act (hereinafter the Regulations), (9 C.F.R. §§ 201.1-.200); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter the Rules of Practice), (7 C.F.R. §§ 1.130-.151), by filing a Complaint on March 25, 1996.

The Complaint alleges that on or about June 26, 1995, Arizona Livestock Auction, Inc. (hereinafter Respondent), "engaged in unfair and unreasonable practices in connection with the holding, feeding, watering and overall handling of livestock at the stockyard, in that [R]espondent failed to provide reasonable services and care in connection with the care of a disabled cow so as to prevent unnecessary damage, injury, and suffering[,]" in willful violation of sections 307 and 312(a) of the Packers and Stockyards Act, (7 U.S.C. §§ 208, 213(a)), and section 201.82 of the Regulations, (9 C.F.R. § 201.82). (Complaint at 2-3.) Respondent was served with the Complaint on

March 29, 1996. Respondent failed to answer the Complaint within 20 days, in accordance with section 1.136(a) of the Rules of Practice, (7 C.F.R. § 1.136(a)), and on June 18, 1996, pursuant to section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), Complainant filed a Motion for Decision Without Hearing and a Proposed Decision Without Hearing by Reason of Default, which were served on Respondent on June 29, 1996. On July 19, 1996, Respondent filed Objections to Complainant's Motion for Decision Without Hearing and a Motion for Leave to File Answer Out of Time. On July 23, 1996, pursuant to section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker (hereinafter ALJ) issued a Decision Without Hearing by Reason of Default (hereinafter Default Decision) in which the ALJ denied Respondent's Motion for Leave to File Answer Out of Time, assessed a civil penalty of \$1,500 against Respondent, and ordered Respondent, its officers, agents, employees, successors, and assigns to cease and desist from engaging in any act or practice, in connection with the providing of stockyard services, with regard to delivery, unloading, care, and handling of livestock received at the stockyard, including, but not limited to, nonambulatory animals, which results in unnecessary damage, injury, or suffering to the livestock. (Default Decision at 2, 4.)

On August 28, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.) On September 19, 1996, Complainant filed Complainant's Response to Respondent's Appeal to the Judicial Officer, and on September 23, 1996, the case was referred to the Judicial

Officer for decision. The Decision and Order vacated the ALJ's Default Decision and dismissed the Complaint without prejudice. *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. ___, slip op. at 22 (Nov. 21, 1996).

Complainant filed Complainant's Petition for Reconsideration (hereinafter Petition for Reconsideration) on December 2, 1996, and on December 30, 1996, Respondent filed Response in Opposition to Complainant's Petition for Reconsideration.

The case was referred to the Judicial Officer for reconsideration on December 30, 1996.

Complainant raises two issues in the Petition for Reconsideration. First,

Complainant contends that the Decision and Order filed in this proceeding contains the following inconsistency:

[I]t is inconsistent to state, on the one hand, that Respondent is deemed to have admitted the material allegations of the Complaint by its failure to file a timely answer to a Complaint alleging violations of the [Packers and Stockyards] Act within the Secretary's jurisdiction and then conclude, on the other hand, that the record is insufficient to support a finding that Respondent has engaged in said actions in violation of the [Packers and Stockyards] Act.

. . . .

... Complainant requests that the Judicial Officer reconsider its ruling in this matter and conclude that, since the Secretary has jurisdiction over the matter and Respondent has admitted the material allegations of the Complaint by its failure to file a timely answer, the default judgment should be upheld.

Petition for Reconsideration at 2, 4-5.

Respondent's failure to file an Answer with the Hearing Clerk within 20 days after service of the Complaint constitutes an admission of the allegations in the Complaint, (7 C.F.R. § 1.136(a)). The Complaint was served on Respondent on

March 29, 1996, and Respondent's Answer was due no later than April 18, 1996.

Respondent admits that it failed to file a timely Answer. (Respondent's Appeal Petition at 1.)

Had I found, as Complainant contends in the Petition for Reconsideration, that Respondent, by its failure to file an Answer, had admitted to facts that constitute a violation of the Packers and Stockyards Act, it would have been inconsistent to also find that Respondent did not violate the Packers and Stockyards Act. However, I found, for the reasons fully explicated in the Decision and Order filed in this proceeding, that the facts alleged in the Complaint, which Respondent is deemed to have admitted by its failure to file an answer: (1) do not establish that Respondent engaged in an unfair or unreasonable practice within the meaning of the Packers and Stockyards Act; (2) do not establish that Respondent's conduct resulted in or could result in the type of injury that the Packers and Stockyards Act is designed to prevent; (3) do not establish that Respondent had predatory intent within the meaning of the Packers and Stockyards Act; (4) do not establish that Respondent's conduct constitutes an incipient violation of the Packers and Stockyards Act; (5) do not establish that Respondent violated section 201.82 of the Regulations, (9 C.F.R. § 201.82), and sections 307 and 312(a) of the Packers and Stockyards Act, (7 U.S.C. §§ 208, 213(a)), as alleged in the Complaint, (Complaint at 3); and (6) do not establish that the Secretary has jurisdiction over this matter. In re Arizona Livestock Auction, Inc., supra, slip op. at 18-21.

Second, Complainant asserts that:

[T]he Judicial Officer's decision places Complainant in a difficult and unreasonable position. . . . If Complainant decides to initiate another

Complaint against Respondent alleging the same violations as in the previous Complaint with the intent of producing a full evidentiary record at the hearing in order to address the concerns raised in the Judicial Officer's opinion, Respondent only has to default again to defeat enforcement of the [Packers and Stockyards] Act. Complainant is caught in a "Catch 22" situation. We cannot proceed to hearing if Respondent defaults and we cannot get a judgment unless we go to hearing. As a result of the Judicial Officer's ruling, Complainant will be effectively prevented from enforcing the [Packers and Stockyards] Act. . . . The only way to avoid this result is to remand the matter to allow Respondent to file an answer to the Complaint so that an oral hearing can be held in which Complainant will have the opportunity to develop a full evidentiary record.

Petition for Reconsideration at 5.

Should Complainant file a new Complaint against Respondent, Complainant is not required to file a Complaint identical to the Complaint filed on March 25, 1996. A Complaint which alleges facts that constitute a basis for a proceeding under the Packers and Stockyards Act would avoid the "Catch 22' situation" described by Complainant in the Petition for Reconsideration. (Petition for Reconsideration at 5.)

For the foregoing reasons, the following Order should be issued.

Order

Complainant's Petition for Reconsideration is denied.

Done at Washington, D.C.

January 13, 1997

William G Jenson
Judicial Officer



UNITED STATES DEPARTMENT OF AGRICULTUR

BEFORE THE SECRETARY OF AGRICULTURE

In те:)	P. & S. Docket No. D-96-26
Arizona Livestock Auction, Inc.,)	•
Respondent)	Decision and Order

This case is a disciplinary administrative proceeding instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (hereinafter the Packers and Stockyards Act), (7 U.S.C. §§ 181-229), and the regulations promulgated under the Packers and Stockyards Act (hereinafter the Regulations), (9 C.F.R. §§ 201.1-.200). The proceeding was instituted pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter the Rules of Practice), (7 C.F.R. §§ 1.130-.151), by a Complaint filed by the Acting Deputy Administrator, Packers and Stockyards Programs (hereinafter Complainant), on March 25, 1996. The Complaint alleges that on or about June 26, 1995, Arizona Livestock Auction, Inc. (hereinafter Respondent), "engaged in unfair and unreasonable practices in connection with the holding, feeding, watering and overall handling of livestock at the stockyard, in that [R]espondent failed to provide reasonable services and care in connection with the care of a disabled cow so as to prevent unnecessary damage, injury, and suffering[,]" in willful violation of sections 307 and 312(a) of the Packers and Stockyards Act, (7 U.S.C. §§ 208, 213(a)), and section 201.82 of the Regulations, (9 C.F.R. § 201.82). (Complaint

at 2-3.) Respondent was served with the Complaint on March 29, 1996. Respondent failed to answer the Complaint within 20 days, in accordance with section 1.136(a) of the Rules of Practice, (7 C.F.R. § 1.136(a)), and on June 18, 1996, pursuant to section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), Complainant filed a Motion for Decision Without Hearing and a proposed Decision Without Hearing by Reason of Default, which were served on Respondent on June 29, 1996. On July 19, 1996, Respondent filed Objections to Complainant's Motion for Decision Without Hearing and a Motion for Leave to File Answer Out of Time. On July 23, 1996, pursuant to section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker (hereinafter ALJ) issued a Decision Without Hearing by Reason of Default (hereinafter Default Decision) in which the ALJ denied Respondent's Motion for Leave to File Answer Out of Time, assessed a civil penalty of \$1,500 against Respondent, and ordered Respondent, its officers, agents, employees, successors, and assigns to cease and desist from engaging in any act or practice, in connection with the providing of stockyard services, with regard to delivery, unloading, care, and handling of livestock received at the stockyard, including, but not limited to, nonambulatory animals, which results in unnecessary damage, injury, or suffering to the livestock. (Default Decision at 2, 4.)

On August 28, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)¹ On

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), (continued...)

September 19, 1996, Complainant filed Complainant's Response to Respondent's Appeal to the Judicial Officer (hereinafter Complainant's Response), and on September 23, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Default Decision is vacated, and the Complaint is dismissed without prejudice.

Respondent raises three issues on appeal.

First, Respondent contends that:

Although Respondent did not file a formal answer to the Complaint within twenty (20) days from the date of service, Respondent did, on July 19, 1996, file a Motion to File Answer Out of Time asking to file an answer beyond the normal time on the following grounds:

- (1) Respondent received the Complaint during the time that Respondent was moving its business from one location to another and, as a result of the disruption caused by this move, the Complaint was inadvertently misplaced and forgotten;
- (2) The Respondent had a number of valid defenses to the Complaint; and
- (3) The Complainant would not be harmed or prejudiced in any way if the Respondent was allowed to file its answer to the Complaint.

A copy of the Respondent's answer was attached to the Motion to File Answer Out of Time.

Respondent's Appeal Petition at 1-2.

¹(...continued)

reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

A failure to file an Answer with the Hearing Clerk within 20 days after service of the Complaint constitutes an admission of the allegations in the Complaint and a waiver of hearing. Specifically, sections 1.136, 1.139, and 1.141 of the Rules of Practice provide:

§ 1.136 Answer.

- (a) Filing and service. Within 20 days after the service of the complaint... the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding....
 - (b) Contents. The answer shall:
- (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
- (2) State that the respondent admits all the facts alleged in the complaint; or
- (3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.
- (c) Default. Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

7 C.F.R. § 1.136(a)-(c).

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing. . . .

§ 1.141 Procedure for hearing.

(a) Request for hearing. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing. . . .

7 C.F.R. § 1.141(a).

The Complaint served on Respondent on March 29, 1996, clearly informs

Respondent of the consequences of the failure to file an Answer, as follows:

The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. §1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Complaint at 3. Moreover, a letter from the Office of the Hearing Clerk serving a copy of the Complaint on Respondent expressly advises Respondent of the effect of failure to file an Answer or deny any allegation in the Complaint, as follows:

Enclosed is a copy of a Complaint, which has been filed with this office under the Packers and Stockyards Act, 1921.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain

each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

Letter from Joyce A. Dawson, Hearing Clerk, to Arizona Livestock Auction, Inc., dated March 26, 1996, at 1. (Emphasis in original.)

Respondent's Answer was due April 18, 1996, and Respondent admits that it failed to file a timely Answer. (Respondent's Appeal Petition at 1.)

Respondent's excuse for it's failure to file a timely Answer, viz., a move of its business from one location to another which caused Respondent to inadvertently misplace and forget the Complaint, provides no basis for my vacating the Default Decision. Further, even if I found, as Respondent contends, that Complainant would not be harmed or prejudiced in any way if Respondent were allowed to file its Answer to the Complaint, that finding would not provide a basis for vacating the Default Decision. Moreover, in the overwhelming majority of cases, there is no basis for setting aside a Default Decision issued in accordance with section 1.139 of the Rules of Practice.²

²See In re Bibi Uddin, 55 Agric. Dec. _____ (Aug. 23, 1996) (default decision proper where Respondent's first filing made more than 9 months after Respondent was served with the Complaint); In re Billy Jacobs, Sr., 55 Agric. Dec. _____ (Aug. 15, 1996) (default decision proper where Respondent's first filing made more than 9 months after Respondent was personally served with the Complaint); In re Sandra L. Reid, 55 Agric. Dec. _____ (July 17, 1996) (default decision proper where Respondent's first filing was made 43 days after Respondent was served with the Complaint); In re Jeremy Byrd, 55 Agric. Dec. 443 (1996) (default order proper where Answer was filed 51 days after Respondent served with the Complaint); In re Moreno Bros., 54 Agric. Dec. 1425 (1995) (default order proper where timely Answer not filed); In re Ronald DeBruin, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); In re James Joseph Hickey, Jr., 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); In (continued...)

²(...continued)

re Bruce Thomas, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); In re Ron Morrow, 53 Agric. Dec. 144 (1994), aff'd per curiam, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994); In re Donald D. Richards, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); In re Mike Robertson, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); In re Morgantown Produce, Inc., 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); In re Johnson-Hallifax, Inc., 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); In re Charley Charton, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); In re Les Zedric, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); In re Arturo Bejarano, Jr., 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; Respondent properly served even though his sister, who signed for the Complaint, forgot to give it to him until after the 20-day period had expired); In re Schmidt & Son, Inc., 46 Agric. Dec. 586 (1987) (default order proper where timely Answer not filed); In re Roy Carter, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; Respondent properly served where Complaint sent to his last known address was signed for by someone); In re Luz G. Pieszko, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); In re Elmo Mayes, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), rev'd on other grounds, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); In re Leonard McDaniel, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); In re Joe L. Henson, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); In re Northwest Orient Airlines, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); In re J.W. Guffy, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); In re Wayne J. Blaser, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); In re Jerome B. Schwartz, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); In re Midas Navigation, Ltd., 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); In re Gutman Bros., Ltd., 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); In re Dean Daul, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); In re Eastern Air Lines, Inc., 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that Respondent's main office did not promptly forward Complaint to its attorneys); In re Carl D. Cuttone, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; Respondent Carl D. Cuttone properly served where Complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), aff'd per curiam, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); In re Corbett Farms, Inc., (continued...) However, on rare occasions Default Decisions have been set aside for good cause shown or where Complainant did not object.³ I find Respondent's jurisdictional challenge to the proceeding sufficiently persuasive to warrant my vacating the Default Decision.

Respondent contends that the Packers and Stockyards Act does not give the Secretary of Agriculture jurisdiction over Respondent's alleged conduct, as follows:

²(...continued)

⁴³ Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay \$54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); In re Ronald Jacobson, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); In re Joseph Buzun, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; Respondent Joseph Buzun properly served where Complaint sent by certified mail to his residence was signed for by someone named Buzun); In re Ray H. Mayer (Decision as to Jim Doss), 43 Agric, Dec. 439 (1984) (default order proper where timely Answer not filed; irrelevant whether Respondent was unable to afford an attorney), appeal dismissed, No. 84-4316 (5th Cir. July 25, 1984); In re William Lambert, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); In re Randy & Mary Berhow, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); In re Danny Rubel, 42 Agric. Dec. 800 (1983) (default order proper where Respondent acted without an attorney and did not understand the consequences and scope of a suspension order); In re Pastures, Inc., 39 Agric. Dec. 395, 396-97 (1980) (default order proper where Respondents misunderstood the nature of the order that would be issued); In re Jerry Seal, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); In re Thomaston Beef & Veal, Inc., 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

³In re Veg-Pro Distributors, 42 Agric. Dec. 273 (1983) (remand order), final decision, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); In re J. Fleishman & Co., 38 Agric. Dec. 789 (1978) (remand order), final decision, 37 Agric. Dec. 1175 (1978); In re Henry Christ, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), final decision, 35 Agric. Dec. 195 (1976); and see In re Vaughn Gallop, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), final decision, 40 Agric. Dec. 1254 (1981).

Nowhere in the Complaint are there any allegations that the Respondent's conduct was unjust or discriminatory or deceptive. The only allegations regarding Respondent's conduct are that it was unfair and unreasonable. Therefore, the only portions of [s]ections 307 and 312(a) of the [Packers and Stockyards] Act and of [s]ection 201.82 of the Regulations that are pertinent in the case are those dealing with the words "unfair" and "unreasonable".

. . . .

The [Packers and Stockyards] Act is an economic regulation statute whose purpose, at least insofar as it relates to stockyards, market agencies and dealers, is to protect sellers and buyers of livestock and insure that livestock sales transactions are carried out in a fair, reasonable and nondiscriminatory manner. . . .

. . .

Thus, in order for the Secretary of Agriculture to have subject matter jurisdiction over the Respondent's conduct that is alleged in the Complaint, the conduct must have been "unfair" or "unreasonable" from an economic context and it must have been "unfair" or "unreasonable" to a person that the [Packers and Stockyards] Act was designed to protect. Nowhere in the Complaint is there an allegation that [Respondent's] conduct was "unfair" or "unreasonable" from an economic standpoint to a person that the [Packers and Stockyards] Act was designed to protect. Clearly, the Respondent's conduct was not "unfair" or "unreasonable" from an economic standpoint to a seller or a buyer because the cow was not consigned to Respondent for sale nor was it sold by Respondent. Respondent's conduct was not "unfair" or "unreasonable" to the owner of the cow because it was the owner who dropped the cow off - not for sale, but to be picked up by a renderer so that the owner did not have to pay a fee for the renderer's service. The Respondent's conduct was not "unfair" or "unreasonable" to any other stockyard, or any other market agency, or any other dealer, because there were no such persons involved. The only living thing to whom the Respondent's conduct could have been considered to be "unfair" or "unreasonable" was the disabled cow and there is nothing whatsoever in the [Packers and Stockyards] Act which indicates that the [Packers and Stockyards] Act was designed to protect a cow.

Nowhere in the [Packers and Stockyards] Act is the Secretary of Agriculture given any jurisdiction to prevent an animal's suffering, injury or death, except insofar as it relates to an economic loss to a person that the [Packers and Stockyards] Act was designed to protect. The Respondent's

conduct as alleged in the Complaint was not "unfair" or "unreasonable" from an economic standpoint to any person that the [Packers and Stockyards] Act was designed to protect, and the Complaint contains no such allegations. Consequently, the Secretary of Agriculture lacks jurisdiction over the conduct of the Respondent that is alleged in the Complaint.

Respondent's Appeal Petition at 5-8.

The Packers and Stockyards Act was described by its sponsors as one of the most comprehensive regulatory measures ever enacted. Furthermore, Congress has repeatedly broadened the Secretary of Agriculture's authority under the Packers and

⁴61 Cong. Rec. 1801 (1921) (By Mr Haugen: "Undoubtedly it is a most far-reaching measure and extends further than any previous law into the regulation of private business, with the exception of war emergency measures, and possibly the interstate commerce act."); 61 Cong. Rec. 4783 (1921) (By Mr. Haugen: "It gives the Secretary of Agriculture complete visitorial, inquisitorial, supervisory, and regulatory power over the packers and stockyards. It extends over every ramification of the packers and stockyard transactions in connection with the packing business. It provides for ample court review. The bill is designed to supervise and regulate and thus safeguard the public and all elements of the packing industry, from the producer to the consumer, without injury or to destroy any unit in it. It is the most far-reaching measure and extends further than any previous law into the regulation of private business-with few exceptions, the war emergency measure and possibly the interstate commerce act."); H.R. Rep. No. 77, 67th Cong., 1st Sess. 2 (1921) ("A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.")

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Stockyards Act.⁵ The primary purpose of the Packers and Stockyards Act was described in a House Report in connection with a major amendment enacted in 1958, as follows:

The Packers and Stockyards Act was enacted by Congress in 1921. The primary purpose of this Act is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small.⁶

H.R. Rep. No. 1048, 85th Cong. 1st Sess. 1 (1957), reprinted in 1958 U.S.C.C.A.N. 5213. Similarly, the United States Supreme Court has described the purpose of the Packers and Stockyards Act, as follows:

For example, in 1924, the Packers and Stockyards Act was broadened to authorize the Secretary of Agriculture to suspend registrants and require bonds of registrants (Act of June 5, 1924, Pub. L. No. 201, 43 Stat. 460 (codified at 7 U.S.C. § 204)). The Packers and Stockyards Act was broadened to cover live poultry dealers or handlers in 1935 (Act of Aug. 14, 1935, Pub. L. No. 272, § 503, 49 Stat. 649 (codified at 7 U.S.C. §§ 192, 218b, 221, 223)). In 1958, the Packers and Stockyards Act was broadened to give the Secretary of Agriculture "jurisdiction over all livestock marketing involved in interstate commerce including country buying of livestock and auction markets, regardless of size" (H.R. Rep. No. 1048, 85th Cong., 1st Sess. 5 (1957), reprinted in 1958 U.S.C.C.A.N. 5212, 5216). In 1976, the Packers and Stockyards Act was broadened to authorize packer-bonding, temporary injunctions, and civil penalties; to require prompt payment of packers, market agencies, and dealers; and to eliminate the requirement that the Secretary of Agriculture prove that each violation occurred "in commerce" (Act of Sept. 13, 1976, Pub. L. No. 94-410, 90 Stat. 1249).

⁶Accord In re Chatham Area Auction, Cooperative, Inc., 49 Agric. Dec. 1043, 1056-57 (1990); In re Ozark County Cattle Co., Inc., 49 Agric. Dec. 336, 360 (1990); In re Victor L. Kent & Sons, Inc., 47 Agric. Dec. 692, 717 (1988); In re Gary Chastain, 47 Agric. Dec. 395, 420 (1988), aff'd per curiam, 860 F.2d 1086 (8th Cir. 1988) (unpublished), printed in 47 Agric. Dec. 1395 (1988); In re Floyd Stanley White, 47 Agric. Dec. 229, 299 (1988), aff'd per curiam, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); In re Sterling Colorado Beef Co., 39 Agric. Dec. 184, 233-34 (1980), appeal dismissed, No. 80-1293 (10th Cir. Aug. 11, 1980); Donald A. Campbell, The Packers and Stockyards Act Regulatory Program, in 1 Davidson, Agricultural Law, ch. 3 (1981 and 1989 Cum. Supp.)

The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.

The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of live stock through the stockyards, all made possible by the collusion between the stockyards management, and the commission men on the one hand, and the packers and dealers on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce. The shipper whose live stock are being cared for and sold in the stockyards market is ordinarily not present at the sale, but is far away in the West. He is wholly dependent on the commission men. The packers and their agents and the dealers who are buyers, are at the elbow of the commission men, and their relations are constant and close. The control that the packers have had in the stockyards by reason of ownership and constant use, the relation of landlord and tenant between the stockyard owner, on the one hand, and the commission men and the dealers, on the other, the power of assignment of pens and other facilities by that owner to commission men and dealers, all create a situation full of opportunity and temptation to the prejudice of the absent shipper and owner in the neglect of the live stock,

in the mala fides of the sale, in the exorbitant prices obtained, in the unreasonableness of the charges for service rendered.

Stafford v. Wallace, 258 U.S. 495, 514-15 (1922). While the Packers and Stockyards Act is remedial legislation and should be liberally construed to effectuate its purposes⁷ and its purposes have been variously described, there is nothing in the Act, the legislative

⁷Farrow v. United States Dep't of Agric., 760 F.2d 211, 214 (8th Cir. 1985); Rice v. Wilcox, 630 F.2d 586, 589 (8th Cir. 1980); Travelers Indem. Co. v. Manley Cattle Co., 553 F.2d 943, 945 (5th Cir. 1977); Glover Livestock Comm'n Co. v. Hardin, 454 F.2d 109, 111 (8th Cir. 1972), rev'd on other grounds, 411 U.S. 182 (1973); Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric., 438 F.2d 1332, 1336 (8th Cir. 1971); Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968); Bowman v. United States Dep't of Agric., 363 F.2d 81, 85 (5th Cir. 1966); Cook v. Hartford Accident & Indem, Co., 657 F. Supp. 762, 767 (D. Neb. 1987) (memorandum opinion); Gerace v. Utica Veal Co., 580 F. Supp. 1465, 1470 (N.D.N.Y. 1984) (memorandum decision); Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co., 495 F. Supp. 565, 570 (M.D. Pa. 1980) (memorandum opinion); In re Frosty Morn Meats, Inc., 7 B.R. 988, 1013 (M.D. Tenn. 1980); Arnold Livestock Sales Co. v. Pearson, 383 F. Supp. 1319, 1323 (D. Neb. 1974) (memorandum opinion); Folsom-Third Street Meat Co. v. Freeman, 307 F. Supp. 222, 225 (N.D. Cal. 1969); In re ITT Continental Baking Co., 44 Agric. Dec. 748, 799 (1985).

Mahon v. Stowers, 416 U.S. 100, 106 (1974) (per curiam) (the chief evil at which the Packers and Stockyards Act is aimed is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys); Denver Union Stock Yard Co. v. Producers Livestock Mktg. Ass'n, 356 U.S. 282, 289 (1958) (the Packers and Stockyards Act is aimed at all monopoly practices, of which discrimination is one); Jackson v. Swift Eckrich, Inc., 53 F.3d 1452, 1460 (8th Cir. 1995) (the Packers and Stockyards Act has its origins in antecedent antitrust legislation and primarily prevents conduct which injures competition); Farrow v. United States Dep't of Agric., supra, 760 F.2d at 214 (the Packers and Stockyards Act gives the Secretary of Agriculture broad authority to deal with any practices that inhibit the fair trading of livestock by stockyards, marketing agencies, and dealers); Rice v. Wilcox, supra, 630 F.2d at 590 (one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock, and to free him from fear that the channels through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product); Van Wyk v. Bergland, 570 F.2d 701, 704 (8th Cir. 1978) (one purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock marketing industry in order to safeguard farmers and ranchers against receiving (continued...)

*(...continued)

less than the true market value of their livestock); Solomon Valley Feedlot, Inc. v. Butz, 557 F.2d 717, 718 (10th Cir. 1977) (one purpose of the Packers and Stockyards Act is to make sure that farmers and ranchers receive true market value for their livestock and to protect consumers from unfair practices in the marketing of meat products): Pacific Trading Co. v. Wilson & Co., 547 F.2d 367, 369 (7th Cir. 1976) (the Packers and Stockyards Act is a statute prohibiting a variety of unfair business practices which adversely affect competition); Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co., 498 F.2d 925, 927 (10th Cir. 1974) (the chief evil sought to be prevented or corrected by the Packers and Stockyards Act is monopolistic practices in the livestock industry): Glover Livestock Comm'n Co. v. Hardin, supra, 454 F.2d at 111 (the purpose of the Packers and Stockyards Act is to prevent economic harm to producers and consumers); Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric., supra, 438 F.2d at 1337-38 (the purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock marketing and meat-packing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats and other products); Swift & Co. v. United States, supra, 393 F.2d at 253 (the purpose of the Packers and Stockyards Act is to prevent economic harm to producers and consumers); United States Fidelity & Guaranty Co. v. Quinn Brothers of Jackson, Inc., 384 F.2d 241, 245 (5th Cir. 1967) (one of the basic objectives of the Packers and Stockyards Act is to impose upon stockyards the nature of public utilities, including the protection for the consuming public that inheres in the nature of a public utility); Safeway Stores, Inc. v. Freeman, 369 F.2d 952, 956 (D.C. Cir. 1966) (the purpose of the Packers and Stockyards Act is to prevent economic harm to the growers and consumers through the concentration in a few hands of the economic function of the middle man); Bowman v. United States Dep't of Agric., supra, 363 F.2d at 85 (one of the purposes of the Packers and Stockyards Act is to ensure proper handling of shipper's funds and their proper transmission to the shipper); United States v. Donahue Bros., Inc., 59 F.2d 1019, 1023 (8th Cir. 1932) (one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock, and to free him from fear that the channels through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product); Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co., supra, 495 F. Supp. at 570 (one purpose of the Packers and Stockyards Act is to give all possible protection to suppliers of livestock); United States v. Hulings, 484 F. Supp. 562, 567 (D. Kan. 1980) (memorandum opinion) (one purpose of the Packers and Stockyards Act is to protect farmers and ranchers from receiving less than fair market value for their livestock and to protect consumers from unfair practices); Guenther v. Morehead, 272 F. Supp. 721, 725-26 (S.D. Iowa 1967) (the thrust of the Packers and Stockyards Act is in the direction of stemming monopolistic tendencies in business; the unrestricted free flow of livestock is to be preserved by the elimination of (continued...)

(continued...)

*(...continued)

certain unjust and deceptive practices disruptive to such traffic; the Packers and Stockyards Act deals with undesirable modes of business conduct by livestock concerns which are made possible by the disproportionate bargaining position of such businesses); De Vries v. Sig Ellingson & Co., 100 F. Supp. 781, 786 (D. Minn. 1951) (the Packers and Stockyards Act was passed for the purposes of eliminating evils that had developed in marketing livestock in the public stockyards of the nation; controlling prices to prevent monopoly; eliminating unfair, discriminatory, and deceptive practices in the meat industry; and regulating rates for services rendered in connection with livestock sales), aff'd, 199 F.2d 677 (8th Cir. 1952), cert. denied, 344 U.S. 934 (1953); Midwest Farmers, Inc. v. United States, 64 F. Supp. 91, 95 (D. Minn. 1945) (by the Packers and Stockyards Act, Congress sought to eliminate the unfair and monopolistic practices that existed; one of the chief objectives of the Packers and Stockyards Act is to stop collusion of packers and market agencies; Congress made an effort to provide a market where farmers could sell livestock and where they could obtain actual value as determined by prices established at competitive bidding); Bowles v. Albert Glauser, Inc., 61 F. Supp. 428, 429 (E.D. Mo. 1945) (government supervision of public stockyards has for one of its purposes the maintenance of open and free competition among buyers, aided by sellers' representatives); In re Petersen, 51 B.R. 486, 488 (Bankr. D. Kan. 1985) (memorandum opinion) (one purpose of the Packers and Stockyards Act is to ensure proper handling of shippers' funds and their proper transmission to shippers); In re Farmers & Ranchers Livestock Auction, Inc., 46 B.R. 781, 793 (Bankr. E.D. Ark. 1984) (memorandum opinion) (one of the primary purposes of the Packers and Stockyards Act and its regulations is to protect the welfare of the public by assuring that the sellers and buyers who are customers of the market agencies and dealers are not victims of unfair trade practices); In re Ozark County Cattle Co., supra, 49 Agric. Dec. at 360 (the primary objective of the Packers and Stockyards Act is to safeguard farmers and ranchers against receiving less than the true value of their livestock); In re Victor L. Kent & Sons, Inc., supra, 47 Agric. Dec. at 717 (the primary purpose of the Packers and Stockyards Act is to assure not only fair competition, but also, fair trade practices in livestock marketing and meat packing); Harold M. Carter, The Packers and Stockyards Act, 10 Harl, Agricultural Law § 71.05 (1996) (among the more important purposes of the Packers and Stockyards Act are to prohibit particular circumstances which might result in a monopoly and to induce healthy competition; prevent potential injury by stopping unlawful practices in their incipiency; prevent economic harm to livestock and poultry producers and consumers and to protect them against certain deleterious practices of middlemen; assure fair trade practices in order to safeguard livestock producers against receiving less than the true value of livestock as well as to protect consumers against unfair meat marketing practices; insure proper handling of funds due sellers for the sale of their livestock; and assure reasonable rates and charges by stockyard owners and market agencies in connection with the sale of livestock; and assure free and unburdened flow of livestock through the marketing

history relating to the Act, or the pertinent case law indicating that the Packers and Stockyards Act is designed to prevent injury to or suffering of livestock apart from the effect that the injury to or suffering of the livestock may have on competition, trade, producers, purchasers, consumers, or other persons that the Packers and Stockyards Act is designed to protect. Moreover, a prior proposal to consolidate section 201.82 (the section of the Regulations which Respondent is alleged in the Complaint to have violated) and section 201.110 of the Regulations reveals that the purpose of section 201.82 is not to protect animals, but rather, to protect the producer or seller from monetary loss, as follows:

Handling and Weighing Livestock and Live Poultry. Section 201.82 of the regulations requires stockyard owners, market agencies, dealers, and packers to exercise reasonable care and promptness when handling livestock to prevent shrinkage, injury, death or other conditions which may result in monetary loss to the producer or seller. Similarly, § 201.110 requires packers and poultry dealers or handlers to weigh live poultry as promptly as possible after the poultry is loaded on a vehicle, again to retard shrinkage, injury, death or other conditions which may result in monetary loss to the producer or seller. These regulations help assure producers against loss while their livestock or live poultry is in control of the buyer. This notice proposes to consolidate §§ 201.82 and 201.110 into a single regulation.

48 Fed. Reg. 42,825 (1983).

Complainant contends however that:

While [R]espondent cites several cases in support of its contention that the [Packers and Stockyards] Act was intended to protect economic loss to a person, none of those cases support the proposition that the sole purpose of the Packers and Stockyards Act is to protect economic loss to a person.

⁸(...continued) system unincumbered by monopoly or other unfair, unjustly discriminatory, or deceptive practices).

In fact, section 312(a) of the [Packers and Stockyards] Act (7 [U.S.C.] §213) specifically provides as follows:

(a) It shall be unlawful for any stockyard owner, market agency or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock. [emphasis supplied]

This section gives the Secretary jurisdiction over unfair practices of stockyard owners involving feeding, watering, holding, delivery, shipment, weighing, or handling of livestock without requiring that an economic harm to an individual occur. The complaint alleges that [R]espondent engaged in unfair practices by the manner in which it handled an animal located on its premises. . . . Once the disabled animal was placed on [R]espondent's premises, [R]espondent was responsible for exercising fair practices in the handling and care of that animal as required by section 312(a) of the [Packers and Stockyards] Act. . . .

It is irrelevant whether the animal was consigned to [R]espondent for sale or sold by [R]espondent. Section 312(a) of the [Packers and Stockyards] Act does not in any way limit its application only to instances where an animal has been consigned to a stockyard or sold by a stockyard. The important point is that the animal was under [R]espondent's control by virtue of it being on [R]espondent's premises and [R]espondent asserted dominion and control over the animal by moving it.

Nowhere in section 312(a) of the [Packers and Stockyards] Act is there a requirement that an individual person suffer an economic loss from such inadequate handling of an animal. Section 312(a) explicitly requires that animals be handled without unfair or unjustly discriminatory practices, and the requirement that livestock be handled in a manner consistent with good husbandry practices — which the animal at issue certainly was not, is fully within the Secretary's jurisdiction and authority.

In addition, section 307(b) of the [Packers and Stockyards] Act (7 [U.S.C.] §208) places an affirmative responsibility upon a stockyard owner to manage and regulate its stockyard in a just, reasonable and non-discriminatory manner. Complainant alleged in its complaint that the [R]espondent failed to manage and regulate its stockyard in a reasonable manner by failing to provide reasonable services and care in connection

with the care of a disabled cow so as to prevent unnecessary damage, injury or suffering. There is also no language contained in this provision that limits the application of this section only to instances where there is proof of economic harm to an individual.

Section 201.82 of the Regulations (9 C.F.R. §201.82) also requires a stockyard owner to exercise reasonable care and promptness with respect to loading, transporting, holding, yarding, feeding, watering, weighing or otherwise handling livestock or live poultry to prevent waste o[f] feed, shrinkage, injury, death or other avoidable loss. While the complaint does not allege economic harm to an individual, it is clear that this particular animal retained some value as long as it was alive. This being the case, [R]espondent was obligated to exercise reasonable care and promptness in its handling of the disabled animal to prevent injury or death. In the present case, [R]espondent failed to exercise such reasonable care and promptness which resulted in the unnecessary suffering of the animal and the loss of any value it retained while alive.

Therefore, the subject matter of the [C]omplaint is well within the jurisdiction and authority conferred to the Secretary under sections 307 and 312(a) of the [Packers and Stockyards] Act as well as section 201.82 of the Regulations.

Complainant's Response to Respondent's Appeal to the Judicial Officer at 5-8.

I agree with Complainant that the Secretary of Agriculture's jurisdiction over this matter is not dependent on proof that the cow in question was consigned for sale to Respondent or sold by Respondent, or on proof that there was actual economic harm to an individual. Instead, the Secretary of Agriculture's jurisdiction is dependent on whether Respondent's conduct, as alleged in the Complaint and admitted by Respondent's failure to answer, constitutes an unfair or unreasonable practice. The meaning of the words unfair or unreasonable must be determined by the facts of each case within the purposes of the Packers and Stockyards Act.9

⁹See Spencer Livestock Comm'n Co. v. Department of Agric., 841 F.2d 1451, 1454 (10th (continued...)

Respondent is deemed by its failure to file a timely Answer to have admitted that it failed to provide reasonable services and care in connection with the care of a disabled cow so as to prevent unnecessary damage, injury, and suffering, as follows:

The disabled cow was unloaded at the stockyard by [R]espondent's employee from a customer's trailer. Once the disabled cow was removed from the trailer, it was placed in a bobcat vehicle and unloaded in an area where a renderer picks up [R]espondent's dead animals. The disabled cow was placed next to a dead steer and left to expire naturally in heat in excess of 100 degrees fahrenheit with no shelter, food or water for approximately three hours. Respondent failed to make adequate arrangements for the care of the disabled cow nor did it attempt to obtain medical assistance, or to euthanize the animal.

A passerby observed the disabled cow in the rendering area at approximately 4:00 p.m. and contacted the local police for assistance. At approximately 5:00 p.m., the passerby informed [R]espondent's employee, Winnie Wilson, that a disabled cow was in the rendering area. Ms. Wilson contacted the Arizona Department of Agriculture to request assistance in destroying the disabled animal. A livestock officer from the Animal Services Division of the Arizona Department of Agriculture arrived at [R]espondent's premises at approximately 6:00 p.m. that same day. The livestock officer examined the disabled animal and then destroyed it at approximately 6:15 p.m.

Complaint at 2-3.

The record in the instant proceeding establishes that Respondent failed to provide a disabled cow with shelter, food, and water for approximately 3 hours. Moreover, the record establishes that Respondent did not attempt to obtain medical assistance for the cow and asked the Arizona Department of Agriculture to destroy the disabled cow a

⁹(...continued)

Cir. 1988); Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co., supra, 498 F.2d at 930; Capitol Packing Co. v. United States, 350 F.2d 67, 76 (10th Cir. 1965); Swift & Co. v. Wallace, 105 F.2d 848, 854-55 (7th Cir. 1939); Rowse v. Platte Valley Livestock, Inc., 604 F. Supp. 1463, 1466 (D. Neb. 1985) (memorandum opinion); United States v. Hulings, supra, 484 F. Supp. at 566-67; Guenther v. Morehead, supra, 272 F. Supp. at 728.

number of hours after the cow was on Respondent's premises. Respondent concedes that its conduct could be considered to be unfair or unreasonable to the disabled cow, (Respondent's Appeal Petition at 8), and I agree with the ALJ that Respondent failed to provide services to prevent unnecessary suffering, (Default Decision at 3). Nonetheless, the Secretary of Agriculture's jurisdiction in this case is dependent upon finding that Respondent's conduct constitutes an *unfair* or *unreasonable* practice within the meaning of the Packers and Stockyards Act. While failure to provide shelter, food, water, and medical assistance can constitute an *unfair* or *unreasonable* practice within the meaning of the Packers and Stockyards Act, the record in this proceeding does not support such a

Complainant's Response to Respondent's Appeal to the Judicial Officer at 7-8.

On the other hand, Complainant appears to allege in the Complaint that Respondent's failure to destroy the cow earlier than the cow was destroyed constitutes an unfair and unreasonable practice within the meaning of the Packers and Stockyards Act, as follows:

Respondent failed to make adequate arrangements for the care of the disabled cow nor did it attempt to obtain medical assistance, or to euthanize the animal.

¹⁰Complainant appears to take inconsistent positions regarding Respondent's conduct as it relates to the death of the disabled cow. On the one hand, Complainant contends in Complainant's Response to Respondent's Appeal to the Judicial Officer that Respondent's failure to exercise reasonable care to prevent the death of the disabled cow is an *unfair* and *unreasonable* practice within the meaning of the Packers and Stockyards Act, as follows:

[[]I]t is clear that this particular animal retained some value as long as it was alive. This being the case, [R]espondent was obligated to exercise reasonable care and promptness in its handling of the disabled animal to prevent injury or death.

finding. Further, the record does not establish: that Respondent's conduct resulted in or could result in the type of injury that the Packers and Stockyards Act is designed to prevent; any predatory intent on the part of Respondent; or that Respondent's conduct constitutes an incipient violation of the Packers and Stockyards Act...

Finally Respondent contends that:

Even if we assume for the sake of argument that the Secretary of Agriculture has subject matter jurisdiction over the conduct of the Respondent that is alleged in the Complaint, the Administrative Law Judge erred in assessing a civil penalty against the Respondent.

In determining the amount of the civil penalty to be assessed, section 312(b) requires the Secretary to consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.

In this case, the Administrative Law Judge could not have followed the statutory mandate because the record contains no information whatsoever regarding the size of Respondent's business and no information whatsoever regarding the effect that a penalty would have on Respondent's ability to continue in business.

As the proponent of an order assessing a civil penalty, GIPSA was required to produce evidence in accordance with the statutory requirements showing that the penalty was reasonable before any civil penalty could be lawfully assessed. Bosma v. U.S. Department of Agriculture, 754 F.2d 804 (9th Cir. 1984). Inasmuch as there was no evidence in the record regarding the size of the Respondent's business or the effect that a penalty would have on Respondent's ability to continue in business, the Administrative Law Judge had no basis for assessing a civil penalty against the Respondent. See, e.g., Bosma v. U.S. Department of Agriculture, [I]d; Hutto Stockyards Inc. v. U.S. Department of Agriculture, 903 F.2d 299 (4th Cir. 1990). Consequently, that portion of the Administrative Law Judge's order assessing a civil penalty against the Respondent should be set aside.

Respondent's Appeal Petition at 10-11.

Since I am vacating the Default Decision and dismissing the Complaint without prejudice, Respondent's third and final argument need not be addressed.

Whether Respondent's conduct constitutes or does not constitute an unfair or unreasonable practice within the meaning of the Packers and Stockyards Act must be determined on the facts of each case. The limited record in this default proceeding does not support a finding that Respondent's conduct constitutes an unfair or unreasonable practice within the meaning of the Packers and Stockyards Act.

For the foregoing reasons, the following Order should be issued.

Order

The Decision Without Hearing by Reason of Default filed on July 23, 1996, is vacated, and the Complaint is dismissed without prejudice.

Done at Washington, D.C.

November 21, 1996

Villiam G. Jerson